(21)

No. 755.

Supreme Court of the United States

OCTOBER TERM, 1943.

C. E. MOTTAZ, I. C. SMITH, VIRGINIA BEHNKEN, WILLIAM H. MORGENS, AND CONTINENTAL COMPANY, A CORPORATION,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, GUSTAVE J. CRECELIUS, ANNA M. CRECELIUS AND MYRTLE K. CRECELIUS AND KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

to the Supreme Court of the State of Missouri

and

BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX

Petition for Writ of Certiorari

Brief in Support of Petition

Table of Cases Cited

STATUTES

BOOKS

No. .....

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, C. E. Mottaz, I. C. Smith, Virginia Behnken, William H. Morgens, and Continental Company, a Corporation, respectfully show as grounds for the issuance of a writ of certiorari to the Supreme Court of the

State of Missouri, *en banc*, which is the highest court of that state:

This petition seeks a review of the final judgment and decision of the Supreme Court of Missouri which became final on December 6, 1943, in the cases (consolidated and decided in a single opinion) of *Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri et al.* v. *Continental Life Insurance Company, defendant, Gustave J. Crecelius et al., appellants*, No. 38119, and *Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri et al.* v. *Continental Life Insurance Company, defendant, C. E. Mottaz et al., appellants*, No. 38120 (R. 313, 331, 332, 339) 175 S. W. 2d 836 (not yet officially reported), wherein petitioners as stockholders of the Continental Life Insurance Company, a corporation, sought to intervene to make claim to assets of said corporation remaining at the conclusion of liquidation proceedings of said company under the Insurance Code of Missouri.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

This case was a three party controversy over the disposition of a fund of approximately $100,000. This fund remained in the hands of the Superintendent of the Insurance Department of the State of Missouri (hereafter referred to as Superintendent), after reinsurance of the risks of the dissolved Continental Life Insurance Company had been effected in the course of proceedings instituted by said Superintendent to liquidate, settle and wind up the affairs of said company under the Missouri Insurance Code. The contract of reinsurance executed by the Superintendent (on behalf of the policyholders and others

interested) and by the Kansas City Life Insurance Company (the reinsuring company) expressly excepted a fund of $225,000 from assets of the dissolved Continental Life Insurance Company conveyed to said reinsuring company to be used to pay the costs of the liquidation proceedings (R. 52, 53). When the costs for the payment of which said fund had been set aside and excepted had been paid, the Superintendent filed application with the circuit court for authority to dispose of the remainder of said fund because it was no longer needed for the purposes for which it was excepted and retained by him (R. 76). Thereupon these petitioners and certain former policyholders sought to intervene in said circuit court and claim the fund (R. 80, 84). The circuit court denied their applications to intervene and awarded the fund to the Kansas City Life Insurance Company (R. 281-282). On appeal to the Missouri Supreme Court, that court did not pass on petitioners' right to intervene but in disregard of the explicit provisions of the code awarded the fund to the Kansas City Life Insurance Company for the benefit of policyholders on the ground that it would be inequitable for the stockholders to receive it (R. 314, 319).

(It may be said in passing that the decision is inequitable because a windfall of the fund results to the Kansas City Life Insurance Company without benefit to the policyholders.)

The Missouri Insurance Code (Secs. 6047-6076, R. S. Mo., 1939, the part deemed relevant being set out, in the appendix to the brief) provides the exclusive method for liquidating and winding up the affairs of insolvent insurance companies. Liquidation proceedings under that Code are commenced by the Superintendent in the appropriate circuit court (Sec. 6052). When that court enters final judgment dissolving the company or declaring it insolvent,

the Superintendent takes title to the assets for the benefit of creditors, policyholders, and *other persons interested* (Sec. 6058, Appendix). Thereafter the Superintendent liquidates the company under the supervision of the court in one of two ways: (a) by sale of its assets, and distribution of the proceeds thereof in accordance with Section 6062 (Appendix) or (b) by reinsurance (Sec. 6064, Appendix). If liquidation is by reinsurance (method b), Section 6062 by its express terms does not apply and Section 6064 provides that such reinsurance shall be made upon the best terms possible for *all persons interested.*

In the cases at bar proceedings were instituted under the Code by the Superintendent, judgment was entered declaring the Continental Company insolvent and ordering it dissolved (R. 47). The Superintendent took title to the company's assets and with the court's approval effected liquidation through a contract of reinsurance with the Kansas City Life Insurance Company, under which the policies of Continental were reinsured (R. 52), and provision made for the payment of specified creditors' claims (R. 57) (there are no claims in this case on behalf of other creditors).

It is the contention of petitioners, stockholders of Continental: (1) that the Missouri Insurance Code is an insolvency law, proceedings under which do not merely stay but extinguish claims; that after the policies were reinsured and the other creditors of the company paid, the claims of all persons interested in the company and its assets, other than petitioners, were satisfied and extinguished; and that the stockholders then constituted the only *interested persons* to whom the fund could belong under the Insurance Code (Sections 6058 and 6064, Appendix); (2) that even if the Missouri Insurance Code is not an insolvency law of such effect, nevertheless, under

that Code: (a) when the Superintendent effected reinsurance he, as representative of the policyholders empowered to bind them, *elected* to forego the policyholders' claims for money and to exchange such claims for new policies in the reinsuring company, the result of which was that the policyholders voluntarily eliminated themselves as creditors of the insolvent company and as members of the class defined by the code as *persons interested* in the fund.

When therefore the Supreme Court of Missouri undertook an equitable disposition of the fund in disregard of the Code provisions it ignored petitioners' rights under the Code and thereby denied them the equal protection of the laws.

The record upon which this petition is presented is composed of the printed abstract of record used in the Supreme Court of Missouri, pages Nos. 1 to 309 of the record as certified to this Court, together with the proceedings in the Supreme Court of Missouri as shown by pages Nos. 310 to 344 as certified to this Court.

BASIS OF THE JURISDICTION OF THIS COURT.

This application is made under the authority of Section 237 of the Judicial Code, as amended (28 U. S. C. A. 344 b), and after petitioners have exhausted appellate review provided by state law. It is contended by petitioners that the State of Missouri acting through its Supreme Court has denied petitioners herein the rights, privileges and immunities provided for them by the Insurance Code of Missouri (Secs. 6047-6076, R. S. Mo., 1939) and more especially Sections 6058 and 6064 of said Code, pertinent sections of which statutes are set out in an Appendix to the brief submitted herewith. The judgment of the Su-

preme Court of Missouri sought to be reviewed became final on December 6, 1943 (R. 339).

Petitioners raised the constitutional question by motions to modify the opinion (R. 325) and for rehearing on the decision and judgment of Division Two of the Missouri Supreme Court (R. 323), which decision and judgment was the first ruling on and denial of the rights of petitioners under the Insurance Code (the ruling in the trial court having been solely on the right of petitioners to intervene in the cause (R. 282)). Said motions to modify and for rehearing were overruled (R. 327). The constitutional question was again raised by petitioners in their motion to transfer the cause from Division Two of the Supreme Court of Missouri to the Court *en banc* (R. 328), which said motion was overruled and the cause was transferred on the court's own motion (R. 330). After the Court *en banc* adopted the opinion of Division Two (R. 331) the petitioners again raised the constitutional question in their motion for rehearing (R. 332). That motion was overruled (R. 339).

QUESTIONS PRESENTED.

Did the Missouri Supreme Court deny petitioners the equal protection of the laws guaranteed to them by the 14th Amendment to the United States Constitution when:

1. It failed to award them as stockholders of an insolvent insurance company the assets of that company left after its policyholders had been reinsured and its other creditors paid when such stockholders constituted the only remaining eligible persons under the insurance code to receive such assets?

2. It failed to construe and determine their rights under the insurance code and resorted to equity, although the insurance code exclusively controls the determination of such rights.

REASONS RELIED ON FOR ISSUANCE OF WRIT.

Petitioners contend that the writ should issue because:

(1) Petitioners asserted title to the fund in dispute basing their claim upon local laws (the Missouri Insurance Code) and said claim under said statutory provisions was ignored by the Supreme Court of Missouri.

(2) The Supreme Court of the United States has jurisdiction to determine whether a state court has denied rights asserted by petitioners under local law.

(3) The constitutional question was raised at the first opportunity after petitioners' rights under local laws were disregarded and denied.

PRAYER.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri to the end that the judgment of said Supreme Court of Missouri in the causes above named may be reviewed and that upon such review said decision of the Missouri Supreme Court be

reversed, and for such further relief as to this honorable Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is reported in 175 S. W. 2d 836 (not yet officially reported), and appears in the record at page 313.

STATEMENT AS TO JURISDICTION.

A statement of the basis on which this court has jurisdiction to grant the writ is set forth at pages 5 to 6 of the petition.

STATEMENT OF THE CASE.

For the purposes hereof petitioners rely upon the statement of the case on pages 2 to 5, inclusive, of the petition, filed herewith.

SPECIFICATIONS OF ERROR.

Petitioners submit that the Supreme Court of Missouri erred in the following particulars:

1. In failing to recognize these petitioners as *persons interested* in the assets of the dissolved Continental Life Insurance Company remaining after elimination of creditors and policyholders as persons interested therein although Sections 6058 and 6064 (Appendix) invested these petitioners with an interest in such assets.

2. In failing to apply the liquidation statutes of the Insurance Code of Missouri to determine the rights of petitioners to the fund in dispute.

3. In failing to determine whether the claims of creditors and policyholders of the dissolved Continental Life Insurance Company were discharged, satisfied and extinguished by the liquidation proceedings under the Insurance Code of Missouri.

4. In failing to construe the Missouri Insurance Code for liquidation of insurance companies as an insolvency law, proceedings under which extinguish and not merely stay claims.

5. In failing to determine, after reinsurance of policyholders and payment of other creditors' claims, that petitioners were the only remaining parties eligible under the statute as *interested persons* to receive the fund.

6. In failing to hold that by the voluntary surrender of their claims for money in exchange for reinsurance in another company, the policyholders eliminated themselves as creditors, thus disqualifying themselves as "*interested persons*" eligible to share in the fund.

7. In awarding the fund to Kansas City Life Insurance Company, when the contract of reinsurance expressly excepted said fund from assets of the dissolved company conveyed to said Kansas City Life Insurance Company, whereas under the code the fund belonged to these petitioners.

8. In awarding the fund to Kansas City Life Insurance Company for the stated benefit of policyholders whose claims had been satisfied by reinsurance, resulting in a windfall to said Kansas City Life Insurance Company at the expense of these petitioners to whom the fund belonged under the code.

SUMMARY OF ARGUMENT.

The failure of the Supreme Court of Missouri to give petitioners the fund in controversy, which belonged to them under the Missouri Insurance Code, has denied them the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

I.

The Missouri Insurance Code provides the exclusive method for winding up and liquidating the affairs of an insolvent insurance company.

II.

That Code, under which these proceedings were had, is an insolvency law, providing for the liquidation, settlement and winding up of the affairs of an insolvent insurance company, proceedings under which satisfy (not merely stay) the claims of all creditors (including policyholders).

III.

Under the Missouri law, when an insurance company becomes insolvent the holders of the policies become creditors to the extent of the cash surrender value and the unearned premiums of their policies.

IV.

Under the reinsurance contract in this case by which liquidation was effected the fund in controversy was expressly excepted from the assets transferred to the reinsuring company. Because it was so excepted and because the claims of policyholders and other creditors have been satisfied, petitioners (stockholders of Continental) constituted the only remaining *interested persons* invested by the code with an interest in the excepted asset, and the fund belonged to them.

V.

Even if the Missouri Insurance Code is not an insolvency law of such effect, the stockholders are entitled to the fund because:

A. On the declaration of insolvency of Continental, the policyholders ceased to be policyholders and claims on their policies were reduced to claims for money in the amount of the cash surrender values thereof and the unearned premiums.

B. Under the Code the Superintendent represents and acts for the policyholders in a proceeding to liquidate an insolvent insurance company. When therefore in the case at bar he effected reinsurance he elected for the policyholders to surrender their claims as creditors, for reinsurance in a solvent company.

C. Because the policyholders voluntarily surrendered their status as creditors they thereby disqualified themselves as *interested persons* under the code entitled to share in the remaining assets of the insolvent company, and the stockholders alone of the parties embraced by the code as *interested persons* remained qualified under the code to receive the fund.

VI.

The Supreme Court of the United States has jurisdiction to determine whether a state court has denied to rights asserted under local laws the protection which the United States Constitution guarantees, and this is true even though the state court bases its decision upon nonfederal grounds.

VII.

The protection of the 14th Amendment to the United States Constitution was invoked as soon as petitioners' rights under the local laws were first denied.

ARGUMENT.

That the Missouri Insurance Code is an exclusive Code regulating insurance business and insurance companies, including the dissolution and liquidation of such companies is not and cannot be disputed. *State ex rel.* v. *Hall*, 330 Mo. 1107, 52 S. W. 2d 174; *State ex rel.* v. *Dinwiddie*, 343 Mo. 592, 122 S. W. 2d 912; *McDonald* v. *Pacific States Life Insurance Company*, 344 Mo. 1, 124 S. W. 2d 1157.

This court has held that courts cannot disregard and nullify statutes by application of what they consider equitable principles. *U. S.* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 86 L. Ed. 855. The Missouri Supreme Court has specifically held that equitable principles have been superseded by the Insurance Code and that cases arising under the Code must be decided according to that Code and not according to equitable principles. *Aetna* v. *O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164; *Aetna* v. *O'Malley*, 342 Mo. 800, 118 S. W. 2d 3. In the case at bar the Missouri Supreme Court denied the rights of these petitioners under the Missouri Insurance Code on the ground that to award petitioners the fund in dispute would be inequitable (R. 319).

The State of Missouri, acting through its Supreme Court, has thus denied petitioners their rights under statutes of that state and has thus denied them the equal protection of the laws. *In the Matter of the Commonwealth of Virginia, Petitioner*, 100 U. S. 313, 25 L. Ed. 667; *Norris* v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074.

II.

There are two kinds of insolvency laws. One merely operates to stay the remedy of creditors but does not

satisfy or wipe out the indebtedness. It is illustrated by the provisions of the Bankruptcy Act, as amended June 22, 1928 (11 U. S. C. A. 21 *et seq.*; 52 Stat. 844 *et seq.*). Under this type of insolvency law the remedy is merely stayed, but if such remedy is subsequently reinstated, the creditor can pursue his claim. (*Zavela* v. *Reeves*, 227 U. S. 625, 57 L. Ed. 676). The other type operates to fully satisfy and wipe out the claims of creditors. It is illustrated by Chapter X of the Bankruptcy Act which deals with corporate reorganizations (11 U. S. C. A. 501 *et seq.*, 52 Stat. 883). Under this Act, upon confirmation of a reorganization plan the creditors are bound thereby and the property of the debtor which is dealt with by the plan, or which remains in the hands of the debtor, is free from the claims of creditors (11 U. S. C. A., Sec. 626, 52 Stat. 898; *In Re 333 North Michigan Avenue Building Corp.*, 84 F. 2d 936, Cert. den. 299 U. S. 602, 81 L. Ed. 444). The Missouri Supreme Court has never construed the meaning and effect of the Missouri Insurance Code as an insolvency law and hence has never determined to which of the above classes it belongs.

The Missouri Insurance Code belongs to the latter class of insolvency acts because the declared purpose of that Code is to *liquidate, settle and wind up* the affairs of the company (Sec. 6059, Appendix) and administration of the company's assets and winding up of its affairs are provided for (Secs. 6062, 6064, Appendix; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 73 L. Ed. 318; *In re Salmon & Salmon*, 143 Fed. 395; *In re Weedman Stave Co.*, 199 Fed. 948; *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060). When the word "liquidate" was added to the words "settle and wind up" in the Missouri Code (prior to the commencement of the present case), the word "liquidate" had been defined by the

Missouri Supreme Court to mean "to adjust; to reduce to precision in amount; to ascertain the balance due and to whom payable; to clear up; to pay and settle; *to satisfy*" (*State ex rel.* v. *Cantley*, 330 Mo. 943, 52 S. W. 2d 397). "To satisfy" means "to answer or discharge, as a claim, debt, legal demand, or the like; to give compensation for; to pay off; to requite; as, to satisfy a claim or an execution" (Webster's New International Dictionary).

Under this Code two methods of liquidation (and hence two methods of satisfying claims against the insolvent company) are provided. One method is for the Superintendent to sell the assets and distribute the proceeds *pro rata* to creditors according to their classification under the Code (Sec. 6062, Appendix). The other method is for the Superintendent to effect reinsurance with a solvent company upon the best terms obtainable for all *persons interested* (Sec. 6064, Appendix). By express provision of the Code, distribution of the assets to the creditors *pro rata* is not to be made when reinsurance is effected (Sec. 6062, Appendix). That is to say, if a contract of reinsurance is effected it completes the liquidation of the dissolved company, but if such reinsurance is not effected, then liquidation is accomplished by sale of the assets and distribution of the proceeds *pro rata* among the creditors according to classification (Sec. 6062, Appendix). The situation is comparable to a corporate reorganization proceeding under the Chandler Act, *supra*, wherein the confirmation of a plan of reorganization satisfies the claims of creditors. If any property of the debtor is not disposed of by the reorganization plan, it remains the property of the debtor free and clear of all claims of creditors. So in the case at bar, the method of liquidation under the Code by reinsurance was selected and con-

summated by the execution of a contract of reinsurance by the policyholders (acting through the Superintendent), and their claims as creditors of the insolvent company were thereby satisfied by their election to accept the plan. The fund in question, which was expressly excepted by the reinsurance contract from the assets conveyed to the reinsuring company, was an asset of the insolvent company. Any assets of the insolvent company which remained after such reinsurance continued to be the property of the company or those standing in its place (these petitioners) free and clear of all claims of the policyholders.

III.

Upon the dissolution of an insolvent life insurance company the liability on the policies of the company is terminated and the policyholders become creditors of the company for the cash surrender value and unearned premiums of their policies (*Lovell* v. *St. L. Mutual Life Insurance Co.*, 111 U. S. 264, 28 L. Ed. 423; *Carr* v. *Hamilton*, 129 U. S. 252, 32 L. Ed. 669; *Green* v. *American Life & Accident Co.*, 112 S. W. 2d 924 (Mo. App.).

IV.

By the contract of reinsurance, the fund in dispute was expressly excepted from the assets transferred to the reinsuring company, the Kansas City Life Insurance Company (R. 53).

Upon dissolution of the insolvent Continental Life Insurance Company title to said fund, along with that of all other assets, vested in the Superintendent for the benefit of the creditors and policyholders of said company "and *such other persons as may be interested in such assets*" (Sec. 6058, Appendix). We have established under Point II of this argument, that claims of policyholders

and other creditors were satisfied by the liquidation proceedings and therefore the Superintendent holds the fund "for the use and benefit of * * * such other persons as may be interested in such assets" (Sec. 6058, Appendix). The rights of stockholders on the insolvency or dissolution of an insurance corporation are governed in general respects by the rules applicable to stockholders of other kinds of corporations (32 C. J., p. 1039). Upon insolvency or dissolution stockholders of a corporation own the assets of the corporation subject to payment of its creditors (*U. S. v. Butterworth Corporation*, 269 U. S. 504, 70 L. Ed. 380; *Buder* v. *Stocke*, 343 Mo. 506, 121 S. W. 2d 852.

In 13 Am. Jur., Sec. 1352, p. 1197, it is said:

> "* * * Stated in another way, the rule is that after the dissolution of a corporation, its property passes to its stockholders subject to the payment of the corporate debts."

In *U. S. v. Butterworth Corporation, supra*, this court recognized that stockholders of an insolvent corporation may have an interest in its assets when it said (269 U. S. l. c. 513):

> "* * * It is established that, when a court of equity takes into its possession the assets of an insolvent corporation, it will administer them on the theory that in equity they belong to the creditors and shareholders rather than to the corporation itself."

That the Missouri Insurance Code contemplated that stockholders of an insolvent corporation were interested in the assets of such company has been recognized by the Supreme Court of Missouri in *State ex rel. v. Hall*, 330 Mo. 1107, 52 S. W. 2d 174, 177, wherein that court in speaking of the legislative power of the state to liquidate insurance companies, said:

"The power was first exercised in 1869 by the enactment of an Insurance Code intended to protect policyholders, stockholders, and the public."

It follows therefore by virtue of the elimination of policyholders and other creditors from the classification of *persons interested* in the assets of the dissolved company that these petitioners now constitute the only persons capable of qualifying under the insurance code as "persons interested" in the fund.

V.

Even if the Missouri Insurance Code is not an insolvency law under which claims of creditors may be extinguished, nevertheless, the stockholders, not the policyholders, are entitled to the fund because:

A.

As established in Point III of this argument, when an insurance company has been determined to be insolvent the interests of policyholders are converted by operation of law into claims for money.

B.

Under the Missouri Insurance Code the Superintendent represents and acts for the policyholders in proceedings to liquidate an insolvent insurance company, and his actions are binding upon such policyholders (*Green* v. *American Life & Accident Co.*, 112 S. W. 2d 924 (Mo. App.); *Johnson* v. *American Life & Accident Co.*, 145 S. W. 2d 444 (Mo. App.)). The election of the Superintendent to accept the plan of reinsurance as a method of liquidating and winding up the affairs of the Continental Life Insurance Company was the election of the policyholders to accept said plan. His action was

their action, and they are bound by what he did. The situation therefore is that the policyholders voluntarily accepted the plan of reinsurance, in lieu of the plan of sale of the assets and pro rata distribution of the proceeds, and thereby their claims as creditors of the insolvent company, with their consent, were surrendered in exchange for reinsurance.

C.

Until the policyholders surrendered their money claims for cash surrender values and unearned premiums in exchange for reinsurance they constituted members of the class of *interested persons* qualified under the Code to share in the assets of the insolvent company. Upon their election to accept reinsurance they automatically eliminated themselves from the statutory class of *interested persons* entitled to share in the assets of the insolvent company. The elimination of policyholders and creditors from the class of interested persons therefore leaves only the stockholders qualified as *interested persons* eligible to receive the fund. Elsewhere in this argument it has been demonstrated that stockholders of an insolvent corporation do constitute interested persons under the Missouri Insurance Code.

VI.

Petitioners in the state court asserted a claim under the code to the fund in dispute. The Missouri Supreme Court did not construe or consider said code and, in disregard of it, based its decision upon equitable grounds. In the case of *Broad R. P. Co.* v. *South Carolina*, 281 U. S. 537, 74 L. Ed. 1023, this court said (281 U. S. l. c. 540):

> "Whether the state court has denied to rights asserted under local law the protection which the con-

stitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court. Even though the constitutional protection invoked be denied on non-Federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655, 71 L. Ed. 1279, 1283, 47 Sup. Ct. Rep. 669; *Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 Sup. Ct. Rep. 419; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 Sup. Ct. Rep. 318."

In the case of *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 76 L. Ed. 1102, this court was considering a decision of the Mississippi Supreme Court which declined to pass upon the constitutional questions raised but put its decision upon non-Federal propositions, and this court said (286 U. S. l. c. 282):

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly involved."

Likewise, in the case of *Norris* v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074, this court said (294 U. S. l. c. 590):

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect."

Petitioners were entitled to have their rights under the local law determined by the Missouri court. The Missouri Supreme Court arbitrarily evaded a ruling on the local laws involved and placed its decision on what it

termed equitable grounds. Petitioners were therefore denied the protection of the exclusive code of Missouri by an arbitrary refusal to construe the code relied upon by petitioners.

VII.

In the trial court the decision was that the petitioners here did not have the right to intervene in the cause for the purpose of asserting a claim to the fund. Upon appeal from this order to the Supreme Court of Missouri, the latter court did not rule specifically on that question but did consider the claim of petitioners to the fund. In passing on said claim that court did not construe nor apply the insurance code of Missouri under which petitioners asserted a claim. The Supreme Court unexpectedly put its decision upon equitable grounds rather than upon a construction of the applicable Missouri code. When this was done, petitioners filed a motion for rehearing and a motion to modify the opinion, in both of which motions they alleged that the action of the Supreme Court denied them the equal protection of the laws guaranteed to them by the 14th Amendment to the United States Constitution (R. 323, 325). This was a timely injection of the constitutional question because the decision of the court was the thing that first denied petitioners their constitutional rights. One of the exceptions to the general rule that the raising of a constitutional question in a motion for rehearing comes too late is where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of a denial of a federal right. *Great Northern Railroad Co.* v. *Sunburst Co.*, 287 U. S. 358, 77 L. Ed. 360; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107.

CONCLUSION.

It is respectfully submitted that petitioners raised the constitutional question at the first opportunity, and that the action of the Supreme Court of Missouri in ignoring the statutes relied upon by petitioners denied petitioners the equal protection of the laws guaranteed to them by the 14th Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX.

The Statutes constituting the Missouri insurance insolvency law are Section 6047 to and including Section 6076, Revised Statutes of Missouri, 1939, found in Chapter 37, Article 10 of the Missouri Insurance Code; also found in Missouri Statutes Annotated, Volume 15, Pages 814 to 848 inclusive.

Section 6052 authorizes the Superintendent of the Insurance Department to institute proceedings in the appropriate circuit court against any company believed by him to be insolvent or in an unsound condition, to enjoin the company from further prosecution of its business, or for a judgment dissolving the company, or for both. In the event dissolution is ordered the court may order the liquidation, settlement and winding up of the affairs of such company or its rehabilitation.

Section 6056 provides that if the court sustains the complaint of the Superintendent of Insurance it shall render judgment enjoining the company from further prosecution of its business or dissolving the company, or may by its judgment do both.

For brevity, only those statutes or portions of statutes deemed relevant to this case are quoted, viz.:

Sec. 6058. Title of assets to vest in superintendent.—Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors

and policyholders of such company and such other persons as may be interested in such assets. (R. S. 1929, Sec. 5947.)

Sec. 6059. Disposition of assets. If the court directs the superintendent of the insurance department to liquidate, settle or wind up the affairs of such company, said superintendent shall take immediate possession of the assets, books and papers of such company, and unless disposition of the assets of said company is made by a reinsurance agreement as may be provided by law, he shall sell and dispose of the real estate and other property of such company, subject to the approval of the court, and may execute in his own name, as superintendent of the insurance department, all necessary and proper conveyances of the same; he may also, in his own name as such superintendent, maintain and defend all actions in the courts of this or any other state, or of the United States, relating to such company, its assets, liabilities and business. (R. S. 1929, Sec. 5948. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

Section 6060 provides a method for proof and allowance of claims against the dissolved company.

Sec. 6062. Distribution of assets. Unless reinsurance of a dissolved company is effected and its assets conveyed to the reinsuring company as provided by law, and unless such dissolved company is being rehabilitated under other sections of this article, the superintendent of the insurance department, under the direction of said court, shall apply the sums realized from the assets of such dissolved company, first, to payment of all the expenses of closing the business and disposing of the assets of such company; second, to the payment of all lawful taxes and debts due the state and the United States and the counties

and municipalities of this state; third, to the payment of the death losses and matured policy claims; fourth, to the payment of the debts and claims allowed against such company, and the unearned premiums and the surrender value of its policies, in proportion to their respective amounts; and lastly, any sums remaining in the hands of said superintendent, after the payments have been made in full as herein provided, shall be disposed of in such manner as said court shall order and direct: * * *

Sec. 6064. Reinsurance of dissolved companies.—Whenever any decree enjoining a company perpetually from further prosecution of its business or judgment of dissolution is rendered or granted under the provisions of this article, the superintendent of the insurance department may make or cause to be made, a report verified by affidavit, showing the actual condition of such company. Whenever such report shall show facts warranting, in the opinion of the superintendent of the insurance department, the reinsurance of the risks of such company, then, subject to the approval and direction of the court, said superintendent shall proceed to reinsure such risks on the best terms obtainable for all persons interested. (R. S. 1929, Sec. 5953. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

Section 6065 provides for payment of the expenses of the liquidation proceedings. It provides that in case reinsurance of the policies is effected, the reinsuring company shall pay the costs of such proceedings.

(22)

No. 755.

Supreme Court of the United States

OCTOBER TERM, 1943.

C. E. MOTTAZ, I. C. SMITH, VIRGINIA BEHNKEN, WILLIAM H. MORGENS, AND CONTINENTAL COMPANY, A CORPORATION,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, GUSTAVE J. CRECELIUS, ANNA M. CRECELIUS AND MYRTLE K. CRECELIUS AND KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION,
RESPONDENTS.

RESPONDENT SCHEUFLER'S BRIEF OPPOSING ISSUING OF A WRIT OF CERTIORARI.

PRESTON ESTEP,
Attorney for Respondent, Edward L. Scheufler, Superintendent of Insurance.

STANLEY BASSETT,
JOS. R. STEWART,
Kansas City, Missouri,
Of Counsel.

INDEX

Table of Cases

STATUTES

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To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

STATEMENT.

Respondent, Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri, sets

forth herewith his statement of the controversy and the holding of the Supreme Court of Missouri:

On January 3, 1934, the Superintendent of the Insurance Department of the State of Missouri instituted a suit against Continental Life Insurance Company under the provisions of Article 10 of Chapter 37 of the Revised Statutes of Missouri, 1929. The amended petition upon which the case was tried alleged in substance that the capital stock fund of Continental Life Insurance Company was impaired; that the policy reserves were impaired; that its liabilities exceeded its available assets; that it was insolvent; and that its further continuance in business would be hazardous to its policyholders and to the public. After a protracted trial, a decree was entered on May 25, 1934, sustaining the allegations of the Superintendent's amended petition and adjudging that the company was insolvent; that its liabilities exceeded its available assets and that it was in such condition its further continuance in business would be hazardous to the public and those holding its policies. A more comprehensive statement of the facts involved on this original trial will be found in the opinion of the Missouri Supreme Court in *O'Malley, etc.*, v. *Continental Life Insurance Company*, 343 Mo. 382, 121 S. W. 2d 834. This decree adjudged that title to all assets of Continental Life Insurance Company was thereby vested absolutely in the Superintendent of Insurance, and his successor or successors in office, for the use and benefit of the creditors and policyholders of such company and such other persons as might be interested therein. This decree constituted a final judgment within the meaning of Section 5945 of the Revised Statutes of Missouri, 1929. An appeal therefrom was taken by Continental Life Insurance Company to the Supreme Court of Missouri, but this appeal was not perfected and was dismissed by the Supreme Court in January of 1935.

On May 31, 1934, on motion of the Superintendent of Insurance under the provisions of Section 5950 of the Revised Statutes of Missouri, 1929, as amended, the Circuit Court entered an Order of Rehabilitation which directed the Superintendent to continue the business of Continental Life Insurance Company, and to manage and operate the same, subject to further orders of the Court. This Order of Rehabilitation provided that all policies of insurance, which had theretofore been in force on the books of Continental Life Insurance Company, should be continued in force and effect during the period of rehabilitation, subject, however, to the terms, conditions and limitations set forth in the Order. The original Order of Rehabilitation was amended on two subsequent occasions but it remained in force and effect, substantially as originally entered, until July 25, 1936.

In January, 1936, the Superintendent of Insurance submitted to the Court his application for instructions and directions as to whether he should negotiate for proposals looking toward the reinsurance of the business of Continental Life Insurance Company. The Court instructed the Superintendent to publicize the fact that proposals for reinsurance of this business could be made to him and directed the Superintendent to receive any such proposals which might be presented not later than April 15, 1936. Eight sealed proposals for reinsurance of Continental Life Insurance Company were submitted to the Superintendent, were opened in the presence of the Court and were filed with the Court. After these proposals had been filed in Court, the Superintendent filed his application seeking the instructions and directions of the Court relative to the acceptance and approval of any of the proposals submitted.

In the meantime the Superintendent had already filed his motion to terminate the procedure in Rehabili-

tation on the ground that the company had continued to be insolvent and that a continuance of the procedure in Rehabilitation would be futile and not to the best interests of policyholders. Continental Life Insurance Company and Ed Mays, its chief stockholder, had filed respective motions to terminate the order of Rehabilitation on the ground that the company was no longer insolvent but that its business, assets and affairs should be returned to the corporation.

During the time that the Superintendent was in charge of the business, assets and affairs of this company, under the supervision of the Circuit Court, he had prepared and filed two statements showing in detail the financial condition of the company. The first of these statements was prepared on December 31, 1934, and it showed that, as of that date, the liabilities of the company, exclusive of a liability for capital stock, exceeded its assets by the amount of $2,135,540.64. Included in the liabilities shown by this financial report was an item of $200,000 to cover the estimated expense of trial and rehabilitation. The second financial statement filed by the Superintendent was prepared as of December 31, 1935. This statement showed that as of this date the liabilities of the company, exclusive of a liability for capital stock, exceeded its assets by the amount of $2,004,451.87. Included in the liabilities shown by this report was an item of $225,000 to cover the estimated expense of trial and rehabilitation. In other words, as of December 31, 1934, not only had the capital stock fund of the company been wiped out, but the assets which should have been available for policyholders and creditors were impaired to the extent of $2,135,540.64; and as of December 31, 1935, the capital stock fund of the company had been wiped out and the assets which should have been available for

policyholders and creditors were impaired to the extent of $2,004,451.87.

In the summer of 1936 there was a trial upon the issues made by the respective motions of the Superintendent, Continental Life Insurance Company and Ed Mays, its chief stockholder, to terminate rehabilitation. During the hearings on these motions evidence was introduced as to the then financial condition of the company. Among other evidence, there was submitted to the Court the two financial statements above referred to. This evidence showed, without contradiction, that the company was grossly and hopelessly insolvent

During the summer of 1936 the Court also conducted hearings upon the Superintendent's application for instructions relative to the disposition to be made of the eight proposals for reinsurance which had been filed in the Court, and evidence was received analyzing and explaining these proposals. The trial upon the various motions to terminate rehabilitation, and upon the Superintendent's application for instruction relative to the sale and reinsurance of the business and assets of the company, was concluded and submitted to the Court on July 22, 1936, and was taken under advisement by the Court until July 25, 1936, when the Court entered certain decrees disposing of all of the issues presented by the various motions to terminate rehabilitation and the Superintendent's application for instructions relative to the sale and reinsurance of the company. These orders or decrees, all of which were entered on July 25, 1936, are set out in full, beginning on page 47 of the Abstract of the Record. They may be summarized as follows, in the order of their actual entry upon the records of the Court:

1. An order or decree which disposed of the respective motions to terminate rehabilitation, by denying

the motions of the company and Ed Mays and by sustaining the motion of the Superintendent, specifically finding in this connection that the company had continued to be insolvent from the date of the original decree of insolvency entered on May 25, 1934, and that it was then insolvent. It decreed a dissolution and annulment of the charter of the company and authorized the Superintendent to settle and wind up its affairs. It provided that the sum of $225,000 in cash be set aside for the purpose of paying certain expenses in connection with the rehabilitation of Continental Life Insurance Company and the settlement of its affairs (R. 47).

2. A decree which approved the contract of reinsurance of Kansas City Life Insurance Company, embodying said contract in the decree, and which fixed a lien of fifty per cent upon the reserves of non-registered policyholders, in accordance with certain provisions of the reinsurance contract (R. 49).

3. An order or decree of the Court which dealt more specifically with the sum of $225,000, referred to in the two preceding decrees, defining its purposes and the method by which it was to be administered and adjudging that the balance, if any, remaining in such fund, after the purposes for which it had been set aside had been accomplished, was to be paid over to Kansas City Life Insurance Company (R. 74).

After the entry of these orders and decrees on July 25, 1936, both the company and Ed Mays, its chief stockholder, filed motions for a new trial and in arrest of Judgment (R. 202-207). After the overruling of these motions a joint appeal was taken by these parties to the Supreme Court of Missouri (R. 220). The Superintendent filed his motion to dismiss this appeal on the ground that the appeal was improperly taken from orders of the

Circuit Court overruling the motions for new trial, and this motion was sustained by the Supreme Court on April 14, 1938, and the appeal was accordingly dismissed (R. 225). In the meantime the Supreme Court had under consideration an appeal of the Superintendent of Insurance from allowance of fees made to Theodore Rassieur, one of the attorneys representing the company in the original trial. This case was decided favorably to the Superintendent on September 17, 1938, in an opinion which reviews in some detail the facts which were before the Circuit Court on the original trial in connection with the insolvency of Continental Life Insurance Company and the mismanagement of its business and affairs by Ed Mays, its president and chief stockholder (*O'Malley v. Continental Life Insurance Company*, 121 S. W. 2d 834, 343 Mo. 382).

On September 13, 1940, the Superintendent of Insurance filed his final report and settlement concerning his administration of the fund, originally in the amount of $225,000, withheld from Kansas City Life Insurance Company under the provisions of the decrees entered on July 25, 1936, for the purpose of paying expenses in connection with the settlement and winding up of the business and affairs of Continental Life Insurance Company (R. 76). A Notice of Publication as to the filing of such final report was approved by the Court, fixing October 18, 1940, as the date upon which the report was to be submitted to the Court for approval (R. 79). Proof of Publication and Notice was filed on October 18, 1940, and on that date the final report of the Superintendent was presented and submitted to the Court (R. 80). On this same day C. E. Mottaz et al., who styled themselves as stockholders of the the dissolved Continental Life Insurance Company, filed their application for leave to intervene in the cause (R. 80). On November 22, 1940, Gustave J. Crecelius et

al., former policyholders of Continental Life Insurance Company, whose policies had been assumed by Kansas City Life Insurance Company under the terms and provisions of the Contract of Reinsurance set forth and embodied in the decrees entered on July 25, 1936, filed their application for leave to intervene in the cause (R. 84).

On November 22, 1940, Kansas City Life Insurance Company, which had become a party in said cause by reason of the Contract of Reinsurance approved by the Circuit Court on July 25, 1936, and the decrees of the Court entered on that day vesting it with an absolute right to any balance remaining in said fund, originally in the amount of $225,000 withheld from it for the purpose of paying the expense of settling and winding up the business and affairs of Continental Life Insurance Company, filed its motion, seeking an order of the Court to disburse to it the balance of said fund (R. 87), to be applied for the benefit of the Continental policyholders as provided in said contract.

On November 22 and November 23, 1940, the Court heard the respective applications of the policyholders and alleged stockholders for leave to intervene and the motion of Kansas City Life Insurance Company for the disbursement to it of the balance remaining in said fund. These matters were taken under submission by the Court until April 7, 1941, when the Court entered its orders denying the application of the policyholders and alleged stockholders for leave to intervene, and sustaining the motion of Kansas City Life Insurance Company for the disbursement to it of the balance remaining in such fund. On the same day the Court entered an order approving the final report of the Superintendent of Insurance (R. 90-93). Thereafter the policyholders and alleged stockholders filed their respective motions for a new trial, which

proved unavailing (R. 94-95), and these parties have prosecuted appeals from the judgments of the Court denying their applications for leave to intervene.

The Supreme Court of Missouri decided the case (175 S. W. 2d 836) and denied the appealing stockholders any relief. The Missouri court, in its opinion as written, reviewed the facts in the case as well as the history of the Continental failure, and the Missouri court carefully considered the Missouri statutes composing the Missouri Insurance Code and carefully applied the statutes or code to the facts in the case. In the course of its opinion the Court said (R. 319):

> "We shall endeavor to dispose of the litigation within a reasonable space, expressly reserving our opinion as to all issues not explicitly ruled herein. For instance: The stockholders and the policyholders, complain of the action of the Court in entertaining and sustaining the Kansas City Life's motion to distribute to it while denying their respective petitions to intervene, asserting they were entitled to be heard on the merits. *Notwithstanding the orders of the Court denied the stockholders' and the policyholders' petition to intervene, the parties and the Court proceeded as though the contest between the three claimants was pending on the merits. This was irregular; but in the circumstances, we think we too may consider the case on the merits without discussing all issues presented*" (Italics ours).

The opinion then sets forth the Missouri statutes applicable to the case, and holds that the Superintendent of Insurance followed the statutes, and further holds that the Continental Life Insurance Company was insolvent by more than $2,000,000 and that the Missouri Supreme Court had so found it to be in such an insolvent condition. The opinion recites all steps taken by the Superintendent of

Insurance under the Code and under the directions of the Circuit Court of the City of St. Louis, all as provided by the Missouri Statutes, and the opinion holds that on July the 25th, 1936, the Circuit Court in St. Louis properly entered its orders: (1) terminating the previous order of rehabilitation; (2) approving the contract of reinsurance with the Kansas City Life; and (3) providing for the handling of the withheld fund of $225,000, and directing any balance of said fund to be paid over by the Superintendent of Insurance to the Kansas City Life Insurance Company. The opinion recited that appeals were taken by the chief stockholder of the company from all of these orders of the Circuit Court, and that the appeals were dismissed. The opinion takes up petitioners' allegations and analyzes them, and considers every allegation that the petitioners have ever asserted. The opinion again applies the Missouri Statutes to the contentions of plaintiffs (petitioners) and confirms the holding of the Circuit Court, and denies plaintiffs relief. The Court holds that the insolvency of the Continental exceeded $2,000,000, and that this insolvency occasioned the placing of a lien against the reserve value of a large part of the policies outstanding. The opinion further holds that these liens amounted to as much as $1,500,000 as late as December 31, 1939, and that there was little hope of their extinguishment prior to December 31st, 1946. The opinion, after completely reviewing the case and upholding the statutes of Missouri as well as the acts of the Superintendent and judgments of the Circuit Court, all of which effectively disposed of plaintiffs' claims, went on and said this:

> "With such liens outstanding against the reserve value of the non-registered policies and contracts an award of this fund of approximately $95,000 to the stockholders of the insolvent and dissolved Con-

tinental Life Insurance Company *would be inequitable and would do violence to the intent and spirit of the Insurance Code and the intent and spirit of the Judgments and Decrees of July 25th, 1936, terminating rehabilitation and approving the Contract of Reinsurance*" (Italics ours).

The opinion thereafter takes up the contention of the policyholders (who are not petitioners for this writ) and the opinion then continues to dispose of the case as far as the complaining policyholders are concerned. The further holding of the Court in this opinion applies only to the question of disposition of the fund between the policyholders and the Kansas City Life, and in particular to the application of the fund after its award to the Kansas City Life, and the latter part of the opinion has no bearing upon petitioners' rights since the Court had held that the petitioners were not entitled to the fund.

Inaccuracies in Petition for Writ.

In the petition filed by the petitioners asking this court to grant its writ of certiorari are many inaccuracies and misstatements of fact. In order that this court may have a better understanding of the facts, we here set out our criticism of the petition.

1. On page 3 of the petition there is a misstatement of fact when it alleges, "expressly excepted a fund of $225,000 from assets of the dissolved Continental Life Insurance Company conveyed to said reinsuring company to be used to pay the costs of the liquidation proceedings" (R. 52, 53). The true facts are (R. 53) "the sum of $225,000 in cash *withheld* by First Party for cost of trial in the aforesaid suit and rehabilitation of said Continental Life Insurance Company." All the assets were conveyed

to the reinsuring company as shown by section I of the contract (R. 53), and as adjudged by the Circuit Court of St. Louis in its decrees of July 25th, 1936 (R. 47, 74).

2. On page 3 of the petition the holding of the Missouri Supreme Court is misquoted when it is charged that the court disregarded the Missouri Insurance Code and denied petitioners' claim as inequitable. The truth is that the Missouri Supreme Court (R. 319) held:

> "With such liens outstanding against the reserve value of non-registered policies and contracts, an award of this fund of approximately $95,000 to the stockholders of the insolvent and dissolved Continental Life Insurance Company would be inequitable and would do violence to the intent and spirit of the Insurance Code and the intent and spirit of the judgments and decrees of July 25, 1936, terminating rehabilitation and approving the contract of reinsurance."

The opinion of the Missouri Supreme Court is bottomed on the Code and the decrees of the St. Louis Circuit Court. The word "inequitable" as used in that opinion means only "unreasonable," "unjust," "ridiculous" or some such meaning, and is not to be confused with "a doctrine of equity."

3. On page 4 of the petition it is claimed that the Missouri Insurance Code, or that part of it applicable to the winding up of an insolvent company, is an insolvency law. Such a claim has no support. The Code provides a proper, equitable and orderly method for the handling and winding up of the affairs of an insolvent insurance company in order that all parties will be protected as far as the assets will go. The Code is primarily for the protection of policyholders and creditors. The debtor or the insolvent cannot voluntarily take advantage of the Code.

On the other hand, insolvency laws or the Bankruptcy Act are primarily for the benefit of the debtor or the insolvent, and he can force insolvency laws or the Bankrupt Act upon his creditors (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 73 L. Ed. 318; *In re Salmon & Salmon*, 143 Fed. 395; *In re Weedman Stave Co.*, 199 Fed. 948).

4. On page 5 of the petition it is charged that the Missouri Supreme Court disposed of the case on equitable grounds and in total disregard of the Insurance Code. Such is not the holding of the Missouri court (R. 319, 322). The opinion did hold that by directing Kansas City Life Insurance Company to apply the fund "to the discharge of the liens as if paid by individual policyholders under the reinsurance contract, the policyholders will not be deprived of all benefits and will receive that consideration they might have hopefully anticipated at the time the reinsurance contract was agreed upon if the future events had been foreseen, as it is unlikely that a reinsurer would assume obligations in excess of assets on hand and available to discharge said obligations. We think this is the most equitable disposition of the fund to be made under the instant record and within the scope of the record." So the case was not decided on equitable grounds at all, and did not deprive petitioners of the equal protection of the laws.

5. On page 5 of the petition is set out "BASIS FOR THE JURISDICTION OF THIS COURT." Under said heading it is claimed,

(a) That the Missouri Supreme Court denied petitioners their rights under the Insurance Code. A reading of the opinion clearly demonstrates that the Code was carefully followed and correctly interpreted and applied. When that is done, the United States Supreme Court has

no jurisdiction on certiorari (*Broad River Power Co.* v. *State of South Carolina*, 281 U. S. 537, 74 L. Ed. 1023; *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182).

(b) On page 6 of the petition it is claimed that a Federal constitutional question was timely raised. That is not true. When the Circuit Court in St. Louis denied petitioners the right to intervene, then and there was the time to raise the constitutional question if petitioners wanted that question preserved, but no mention of a constitutional or Federal question gets into the case until the Supreme Court has decided the case. So the question was not timely raised (*McMillen* v. *Ferrum Mining Co.*, 197 U. S. 343, 49 L. Ed. 784; *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57, 28 L. Ed. 69).

6. On page 6 of the petition, under the heading "QUESTIONS PRESENTED," again the petitioners disagree with the holding of the Missouri Supreme Court and contend that such a disagreement confers jurisdiction on this court. How erroneous that contention is can be illustrated by the cases of this court holding that a state supreme court can decide a case any way it wants to, so long as Federal right or constitutional right is not violated. This court cannot substitute its opinions for that of a state supreme court in a case involving the interpretation of a state statute (*Hartford Life Ins. Co.* v. *Blincoe*, 255 U. S. 129, 65 L. Ed. 549; *Broad River Power Co.* v. *State of South Carolina*, 281 U. S. 537, 74 L. Ed. 1023; *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182; *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, 40 L. Ed. 573).

PETITIONERS' SPECIFICATIONS OF ERROR.

Beginning on page 10 of petitioners' brief, they charge the Supreme Court of Missouri with eight errors. Doubtless, petitioners have overlooked the many cases of this court which hold that a state supreme court may commit as many errors as it can and decide a case on the wrong theory, yet this court cannot review that case because of those errors or wrong theories, unless (1) a Federal law or Federal right has been violated, or (2) unless the Constitution has been infringed upon (Cases, *supra*).

PETITION SHOULD BE DISMISSED.

I.

Because the Opinion of the Missouri Supreme Court Is Based upon a Proper Interpretation and Application of the Insurance Code of Missouri.

Secs. 6052 *et seq.*, Mo. Rev. Stats. (Appendix).
State ex rel. v. *Hall*, 330 Mo. 1107, 52 S. W. 2d 174.

1. Sec. 6064, Mo. Rev. Stats., 1939 Petitioners' Appendix), contemplates that all the assets of an insolvent insurance company shall pass to the reinsuring company, and that the costs of the case shall be paid by the reinsuring company (Sec. 6065) under the supervision and control of the court in which the proceedings are pending.

(a) Section 6065 (Appendix) would not require the reinsuring company to pay the costs of the proceedings unless it was contemplated and intended that the reinsuring company would get all of the assets of the insolvent company.

2. The decrees of the Circuit Court of the City of St. Louis, entered July 25th, 1936, were final judgments upon the reinsurance contract and the disposition of any balance of the assets that had been withheld from the reinsuring company by the Superintendent.

Section 6052 (Appendix), the last two lines of which read: "together with such other decrees and orders in connection therewith as the Court may deem advisable";
34 C. J., Sec. 794, p. 502, Note 12B.
Shee v. *Shee*, 319 Mo. 542, 4 S. W. 2d 760, l. c. 761.

Hopkins v. *Cofoid*, 103 Ill. App. 167.

Biedstein v. *Feltz*, 156 S. W. 2d 29, l. c. 31 (Mo. App.).

II.

The United States Supreme Court Has No Jurisdiction.

1. There is no Federal question presented by the record in this case.

U. S. C. A., Title 28, Sec. 344 (b).

Rules of the Supreme Court, Rule 38, Section 5 (a).

Chicago, etc., R. Co. v. *Maucher*, 248 U. S. 359, 63 L. Ed. 294.

Adams v. *Russell*, 229 U. S. 353, 57 L. Ed. 1224.

Cox v. *Texas*, 202 U. S. 446, 50 L. Ed. 1099.

Honeyman v. *Hanan*, 300 U. S. 14, 81 L. Ed. 476.

2. The alleged constitutional or Federal question was not timely raised.

McMillen v. *Ferrum Mining Co.*, 197 U. S. 343, 49 L. Ed. 784.

Susquehanna Boom Co. v. *West Branch Boom Co.*, 110 U. S. 57, 28 L. Ed. 69.

Godchaux Co. v. *Estopinal*, 259 U. S. 179, 64 L. Ed. 213.

3. Certiorari will not lie, because the question for decision was wholly for the state court.

Richardson Machinery Co. v. *Scott*, 276 U. S. 128, 72 L. Ed. 497.

Lynch v. *People of the State of New York*, 293 U. S. 52, 79 L. Ed. 191 (Head Note 3).

Broad River Power Co. v. *South Carolina*, 281 U. S. 537, 74 L. Ed. 1023 (Head Note 2).

Neblett v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182.

III.

There Was No Denial of Due Process.

1. The petitioners were given a full hearing.
Missouri Supreme Court Opinion (R. 314).

2. The decree and judgment of the St. Louis Circuit Court, entered July 25th, 1936, awarding the balance of the fund to the Kansas City Life Insurance Company, was final.

Cases cited under I, 2, above.

IV.

The Missouri Supreme Court Decided the Case on Non-Federal Questions, and There Is Substantial Support for the Opinion.

Cases cited under II, 3, *supra*.

1. The question involved is purely a local question, and one for the state supreme court to decide.

Hartford Life Ins. Co. v. *Blincoe*, 255 U. S. 129, 65 L. Ed. 549.

First National Bank of Garnett v. *Ayers*, 160 U. S. 660, 40 L. Ed. 573.

Broad River Power Co. v. *South Carolina*, 281 U. S. 537, 74 L. Ed. 1023.

V.

The National Bankruptcy Act As Well As Insolvency Laws Are Not Involved.

1. Because insurance companies are excluded from their operation.

National Bankruptcy Act, Section 4B.

In re Supreme Lodge of Masons Annuity, 286 Fed. 180.

Vallely v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348, 65 L. Ed. 297.

SUMMARY OF ARGUMENT.

I.

The petition filed in this Court does not truthfully present the opinion of the Supreme Court of Missouri.

II.

The opinion of the Missouri Supreme Court is a correct interpretation and application of the Missouri Insurance Code, which is an exclusive method for liquidating the affairs of an insolvent insurance company.

III.

The title to any of the remaining funds left in the hands of the Superintendent belonged to the Kansas City Life Insurance Company from and after the Circuit Court decree of July 25th, 1936.

IV.

This Court is without jurisdiction to grant its writ of certiorari, since the Judicial Code does not provide for a review by this Court of the decision of a state supreme court unless there is a Federal question drawn into the case, or unless some provision of the Federal Constitution has been violated, and then only when such questions are properly and timely raised.

V.

The decision of a state supreme court in defining and interpreting a state statute, is decisive and binding upon this Court, and this Court is without authority to substitute its opinion or interpretation of a state statute for that of the state court.

VI.

Petitioners' constitutional rights have not been violated, neither have petitioners been deprived of their property, rights or immunities without due process of law.

ARGUMENT.

Petitioners, in their argument, cite numerous cases which, when read, are wholly void of any authority for the propositions asserted by petitioners. For instance, the case of *U. S.* v. *Bethlehem Steel Corporation*, 315 U. S. 289, merely holds that the Supreme Court cannot disregard an act of Congress in order to reach a conclusion that some judge or person might think to be more just than the results accomplished under the act of Congress.

Again, in the two cases of *In the Matter of the Commonwealth of Virginia*, 100 U. S. 313, and *Norris* v. *Alabama*, 294 U. S. 587, the holding is merely to the effect that a state cannot evade the equal protection clause of the Federal Constitution by deliberately refusing to call negroes into jury service.

Petitioners, in their discussion of insolvency laws, cite cases such as *International Shoe Co.* v. *Pinkus* and *In re Weedman Stave Co.*, which cases hold that a state cannot pass an insolvency law that infringes upon the National Bankruptcy Act, because only Congress can enact bankruptcy laws.

The case of *In re Salmon & Salmon*, cited by petitioners, is an authority to the effect that a state may pass valid laws pertaining to the liquidation of insolvent banks, and inferentially this case is an authority for the Missouri Insurance Code.

The case of *U. S.* v. *Butterworth Corporation*, 269 U. S. 504, cited by petitioners, instead of confirming any position taken by petitioners is an authority for the proposition that when an insolvent company turns over its

property and business to be administered by a receiver, it does this for the purpose of having its assets made available as a trust fund to pay its debts, and the court said:

> "Here the fund being less than the debts, the creditors are entitled to have *all of it* distributed among them according to their rights and priorities" (Italics ours).

Nothing was left for the owners of the stock of the defunct corporation.

Petitioners, on page 20, under point VI, discuss the interpretation of local laws or state statutes by the state court, and each case cited by petitioners is an authority against their contention. For instance, in the case of *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, the Supreme Court denied certiorari, saying:

> "But there is no evasion of the constitutional issue (cases cited), and the non-Federal ground of decision has fair support (cases cited). This court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

In the *Fox River Paper Co. case*, 274 U. S. 651, which case involved the right of a state court to decide questions pertaining to the maintenance of a dam on Fox River, the court said, in denying certiorari:

> "There being no question of evasion of constitutional issue (cases cited), this court on writ of error must accept as final the rule of the state court of last resort on all matters of state law."

The court further said:

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. It is for the state court in cases such as this, to define rights in land located within the state, and the 14th Amendment, in the absence of an attempt to forestall our review of the Constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent."

In the cited case of *Ward* v. *Love County*, 253 U. S. 17, the Supreme Court held that the Supreme Court of Oklahoma had violated a Federal exemption pertaining to the Indians, and held that the Oklahoma Court had evaded a Federal question by deciding the case on non-Federal grounds without substantial support for its decision, but, in passing on the case, the court said:

> "It is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it cannot be reviewed by us."

In the cited case of *Enterprise Irrigation District*, 243 U. S. 157, the Supreme Court dismissed for want of jurisdiction an appeal from the Supreme Court of Nebraska, and, in determining its jurisdiction, the court said this:

> "Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question, and we have no power to disturb it (cases cited). But where the non-Federal ground has fair support we are not at liberty to inquire whether it is right or wrong, but must accept it, as

we do other state decisions on non-Federal ground (Cases cited)."

Petitioners cite the case of *Lawrence* v. *State Tax Commission*, 286 U. S. 276. Certiorari was denied to the Supreme Court of Mississippi since the record did not contain facts concerning local conditions, but the Court held that:

> "The Supreme Court of Mississippi found it unnecessary to pass upon the validity of so much of the statute added by the Amendment of 1928 as exempted domestic corporations from the tax on income derived from outside the state. It said that if the amendment were valid appellant could not complain; if invalid he would still be subject to the tax, since the old law would then remain in force."

This case is just another authority for the proposition that a state court may decide a question pertaining to its statutes, and the United States Supreme Court is bound by that decision unless a Federal question is circumvented by unsubstantial reasoning.

Petitioners, in their attempt to justify their failure to raise their constitutional question for the first time until they filed their motion for rehearing in the Supreme Court, rely on the case of *Great Northern Railroad Co.* v. *Sunburst*, 287 U. S. 358, which case involves a railroad tariff in Montana. However, in that case the court held that there was a virtual stipulation between counsel to the effect that the Supreme Court should consider the constitutional point even though it was not raised until the motion for rehearing was filed. Consequently, this case does not overrule the cases holding that it is too late to raise the question for the first time in the motion for rehearing (*Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 64 L. Ed

213; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480, 484). The other case relied on by petitioners, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, is a case involving a tax assessment in Missouri, but which case is not any authority for the overruling of the general proposition that the raising of a constitutional question for the first time in the motion for rehearing in the Supreme Court comes too late. In this case the Supreme Court of Missouri, by reversing one of its former cases, had deprived the plaintiffs of an opportunity to be heard in another forum, consequently, the injury or damage was not done to plaintiffs until the Supreme Court reversed its former decision, and, naturally, that is the first time that the constitutional question could be raised. This case is merely an exception to the general rule, and one that has been long recognized.

We shall now briefly present our argument in chief.

I.

As hereinbefore pointed out, the petitioners in their petition have included numerous inaccurate statements and erroneous conclusions pertaining to the opinion of the Supreme Court of Missouri sought to be reviewed. In the first place, the decrees and judgments of the St. Louis Circuit Court, on July the 25th, 1936 (R. 47, 49, 74), as well as the contract of reinsurance (R. 52 (Sec. I)) do not recite that the sum of $225,000 was excepted from the assets of the insolvent company, as stated by petitioners, but, on the other hand, these judgments, decrees and the contract itself expressly recite that this sum in cash was being *withheld* by the Superintendent of Insurance, and that it was to be subject to the further orders of the Court and was for the purpose of paying the expenses and counsel fees in connection with the settlement of the affairs

of the Continental and in the disposition and distribution of the assets of said insolvent company. To say that this sum was excepted from the assets is an erroneous statement of fact. It was merely withheld temporarily by the Superintendent, and he was to pay whatever legitimate expenses and fees were incurred and as approved by the Court, and any balance remaining was to be paid over to the Kansas City Life Insurance Company.

Petitioners also attempt to impress this court with the doctrine that the opinion of the Missouri Court wholly disregarded the Missouri Insurance Code and decided the case according to principles of equity. A reading of the opinion certainly refutes such a deduction. The last sentence in that portion of the opinion set out in the middle paragraph on page 319 of the Record certainly shows that the Missouri Court was relying upon the Insurance Code and the judgments and decrees of July 25th, 1936, when it denied the petitioners' claim to the fund in controversy. Certainly it would have been inequitable, unjust, unreasonable and ridiculous for the Missouri Court to award this fund to these stockholders, who had not only dissipated their small investment in the company, but had dissipated more than $2,000,000 belonging to the policyholders of the company. The opinion speaks for itself, and a reading of it will convince anyone that the case was decided strictly in accordance with the Missouri Insurance Code.

II.

The Missouri Insurance Code has been judicially determined to be constitutional in every respect (*State ex rel* v. *Hall*, 330 Mo. 1107, 52 S. W. 2d 174). The provisions of the Missouri Insurance Code pertaining to the rights and prerogatives of the Superintendent of Insurance were

before this court in the early case of *Relfe* v. *Rundle*, 103 U. S. 222, 26 L. Ed. 337, and from that early case down to the present time all courts that have had occasion to write upon the Missouri Insurance Code have recognized it as constitutional, fair, equitable and just. When the Missouri Supreme Court in the present case reviewed that portion of the Code pertaining to the liquidation of insolvent companies, it found no provision in the Code for awarding any of the assets of the insolvent company to the former stockholders so long as liens remained on the policies. The opinion (R. 318) specifically considered the amendments to the Code in 1934, and the opinion fully sets out the contentions made by petitioners. Then the opinion proceeds to declare what the policy of the state of Missouri is, relative to sums realized from the assets of a dissolved insurance company, and this opinion declares that the policy of the state of Missouri, as set forth in the Missouri Insurance Code, requires that all of the assets of an insolvent and dissolved insurance company must go for the payment of expenses, taxes, death claims, policyholder claims, and that all of these claims must be *paid in full*, and then if any balance is remaining, it shall be disposed of *as the court may direct*. Certainly the Supreme Court of Missouri was within its limitations when it deliberately interpreted the statutes of Missouri and declared what these statutes meant and what the policy of the state is. This court has never denied that right to a state supreme court.

Richardson Machinery Co. v. *Scott*, 276 U. S. 128, 72 L. Ed. 497.

Lynch v. *People of the State of New York*, 293 U. S. 52, 79 L. Ed. 191 (Head Note 3).

Broad River Power Co. v. *South Carolina*, 281 U. S. 537, 74 L. Ed. 1023 (Head Note 2).

Neblett v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182.

Hartford Life Ins. Co. v. *Blincoe*, 255 U. S. 129, 65 L. Ed. 549.

First National Bank of Garnett v. *Ayers*, 160 U. S. 660, 40 L. Ed. 573.

This court will not inquire whether the rule applied by the state court is right or wrong, neither will it substitute its own view for that of the state court. As was said by this court in the case of *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 71 L. Ed. 1279, at page 1283:

> "This court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law."

The correctness of this proposition has never been questioned by this court.

III.

The pertinent sections of the Missouri Insurance Code are set out in the appendix of this brief and in the appendix of petitioners' brief. By reference to Section 6052, which section governs the Superintendent in his proceedings to wind up insolvent companies, it will be noted from the last part of said section that, after the judgment dissolving the corporation or perpetually enjoining it from doing business has been entered, the court, upon motion of the Superintendent, may order the liquidation, settlement and winding up of the affairs of such company or for the rehabilitation of such company as provided in this chapter, and *that the court may make such other decrees and orders in connection therewith as the court shall deem advisable.* In other words, the circuit court having jurisdiction of the proceedings has com-

plete power to make any order in connection with the winding up of the affairs of the company that the court may deem advisable. Consequently, on July the 25th, 1936, the Circuit Court of the City of St. Louis had before it all matters pertaining to the liquidation of the Company, and, therefore, it was incumbent upon the Circuit Court at that time to make full and complete orders pertaining to the entire subject-matter, and to fully and completely dispose of the assets of the insolvent company. This the court did, and three orders, as shown by the Record (R. 47, 49, 74), completely disposed of all of the assets of the insolvent company and properly provided that any balance of the cost and expense money that was withheld by the Superintendent should be handed over to the Kansas City Life Insurance Company for the benefit of the Continental policyholders, after the closing of the proceedings. These judgments of the Circuit Court on that date were final judgments, they were appealed from, and were never set aside. Consequently, the title to any remaining funds left in the hands of the Superintendent was by the judgments of the Circuit Court on that date vested in the Kansas City Life Insurance Company for the benefit of said policyholders, and thereafter the expenditure of any amount from these funds must be approved by the Circuit Court, and in the end the Superintendent should file an accounting in order that the Court might determine the net balance to be transferred by the Superintendent to the reinsuring company for the policyholders' benefit. These judgments forever divest the petitioners herein of any right or title to the fund in controversy.

Section 6064, which is the section of the Missouri statute providing for reinsurance of dissolved companies, requires the Superintendent of Insurance, subject to the approval of the Circuit Court, to reinsure the outstanding

business of the insolvent company on the best terms obtainable for all persons interested. This section, as well as the entire Insurance Code, requires the Superintendent to handle the assets of the insolvent company in such a manner as to give the policyholders the fullest protection possible. All through the Code the policyholders are to be given first consideration, next the creditors get consideration, and, lastly, other parties interested. Consequently, the reinsurance section of the statute must require that the Superintendent turn over all of the assets to the reinsuring company "in order to get the best terms obtainable" for the policyholders. Certainly a permanent retention of part of the assets or an allotment of part of the assets to the old stockholders would prevent the making of a reinsurance contract for the best interests of the policyholders. In this case a lien was imposed upon all non-registered policies of the Continental. Therefore, to contend that a portion of the assets was withheld for the benefit of the old stockholders under a reinsurance contract that imposed upon the policyholders a lien on their policy reserves would only result in the making of a reinsurance contract to the detriment of the policyholders, and not on "the best terms obtainable" as required by the statute.

IV.

The jurisdiction of this court to grant its writ of certiorari to a state supreme court is fixed by the Judicial Code, Section 237, amended (U. S. C. A., Title 28, Sec. 344 (b)). The only ground authorized by the Judicial Code for such review is that there has been drawn into the case a Federal question.

Again, Rule 38 of the Supreme Court Rules, and particularly Section 5 of that rule, provides that your

writ is issued only on sound judicial discretion, and will be granted only where there are special and important reasons therefor, and pertaining to a review of a decision of a state court your rule provides, Section 5 (a):

> "Where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Your rule further states, in said Section 5, that the above quoted portion is neither controlling nor fully measuring your discretion, but that it does indicate the character of reasons which will be considered by you. We contend that there is nothing in the petition before you that fulfills or complies with either the requirements of the Judicial Code or your own rule. There is a total absence of a Federal question in this case. No Federal statute or treaty touches this case. This court will not undertake to review the decision of a state court unless it appears affirmatively from the record not only that the Federal question involved was presented for decision to the highest court having jurisdiction, but that its decision of the Federal question was necessary to a determination of the cause (*Honeyman* v. *Hanan*, 300 U. S. 14, 81 L. Ed. 476).

It has been held that the power of the U. S. Supreme Court to review decisions of state courts is limited to decisions on Federal questions (*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107).

It has been consistently held by this court that bare averment of a Federal question is not sufficient. There must be a real, and not a fictitious, Federal question involved. A reading of the opinion under consideration fails to disclose the presence of a Federal question of any kind or nature.

Moreover, if there were a Federal question or constitutional question involved, the petitioners failed to raise such a question at the proper time. Petitioners do not claim that they ever mentioned a violation of their constitutional rights until they filed their motion for rehearing in the Supreme Court, which was after the Supreme Court had written the opinion before you. It has long been the law in this court that when the question is raised for the first time in a motion for rehearing, this court will not take jurisdiction. In the case of *McMillen* v. *Ferrum Mining Co.*, 197 U. S. 343, 49 L. Ed. 784, it is said:

> "It is sufficient for the purpose of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question."

The general rule of this court is again laid down in the case of *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 64 L. Ed. 213, where it is said:

> "The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

This is the holding of the Court, and there are many cases on that point. The only exception to the rule is, as is noted in the above quotation, and that is, where the state court in considering the motion for rehearing, and in which motion the Federal question has been raised

for the first time, takes the question and decides it. Then, of course, the state court has brought the Federal question into its opinion and decision, and, naturally, this court could review the case. It is plain that in the record under consideration the court did not consider the question on the motion for rehearing, and, consequently, there is no Federal question in the case and nothing before this court to permit the taking of jurisdiction by this court on that ground. The motion for rehearing was denied without written opinion. As a matter of fact, petitioners lost their right to contend that there was a deprivation of their constitutional rights and immunities when they failed to include such an allegation in their motion for new trial in the Circuit Court of St. Louis. Certainly, if they were going to contend that their constitutional rights were being infringed upon, it was the denial of their petition to intervene in the Circuit Court that gave rise to any such pretended violation of their Federal rights. The two cases cited by petitioners in support of their tardiness in raising the question have been analyzed and explained above. They are cases within the exception of the general rule, but in no way violate the general rule.

Petitioners claim that their property has been taken without due process of law, and that their rights have been violated, contrary to the provisions of the Federal Constitution. To maintain such a position petitioners say that the Supreme Court has improperly interpreted a local law or statute, and that by its interpretation and application of the local law the Supreme Court of Missouri deprived them of the fund in controversy.

The question that was decided by the Missouri Court was wholly and purely one for a state court to decide, and the opinion of the state court on the Missouri statutes is consistent with previous holdings of the Missouri Su-

preme Court on the Missouri Insurance Code (*State ex rel.* v. *Hall*, 330 Mo. 1107, 52 S. W. 2d 174). Petitioners do not like what the Supreme Court decided, but whether the opinion be right or wrong, this court is without authority to review the decision. This court has frequently said that even though the state court reaches a wrong decision on a local matter, yet this court cannot substitute its opinion therefor. So, even if the opinion in this case were entirely wrong, yet it is upon a question that the Missouri Supreme Court alone can finally pass, and petitioners are bound thereby. The construction and meaning attributed by the Supreme Court of the state to a statute of the state must be accepted by the United States Supreme Court just the same as though its meaning or construction had been specifically expressed in the statute (*Supreme Lodge, etc.*, v. *Meyer*, 265 U. S. 30, 68 L. Ed. 885). A state court can render an erroneous decision on a question of state law, or it may overrule principles established by previous decisions on which everybody had relied, yet that does not confer appellate jurisdiction on the United States Supreme Court.

In *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 183 (Head Note 2), this court, in denying a writ of certiorari to the Supreme Court in a case involving the California Insurance Code, said:

> "It is argued that the authority which the Code confers on the (Insurance) Commissioner to enter into rehabilitation or reinsurance agreements does embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplate such action. It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The

state court held the contrary. All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the state's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the 14th Amendment. We are, therefore, without jurisdiction to review the state court's decision on any of those questions. It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law, the decision of which by the state's highest court is binding on us."

Certainly this late expression from this court, which case involved the Insurance Code of California, should convince anyone that the Missouri opinion in the instant case is final, and that the United States Supreme Court is without authority to review it.

Conclusion.

We respectfully submit that, (1) petitioners failed to raise their alleged constitutional question at the proper time or in the proper court; (2) that the action of the Supreme Court of Missouri in construing, interpreting and applying the Missouri Insurance Code, did not deny petitioners equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution.

We further submit that this court is without jurisdiction, and that its writ should not go because (1) there is no Federal question passed upon or involved in the Missouri Supreme Court decision, and (2) the questions and matters decided by the Missouri Supreme Court were questions upon which only the Supreme Court of the state

could pass, and that its holding is final and controlling upon the Supreme Court of the United States.

Respectfully submitted,

PRESTON ESTEP,

Attorney for Respondent, Edward L. Scheufler, Superintendent of Insurance.

STANLEY BASSETT,
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APPENDIX

In addition to the sections of the Missouri Statutes that petitioners have set out in the Appendix of their brief, we desire to quote other sections of the Missouri Insurance Code pertaining to the liquidation of insolvent insurance companies by the State Insurance Department under the supervision of the Court:

"Sec. 6052. Proceedings to Wind up Companies.--Whenever it shall appear to the superintendent of the insurance department, from any examination made by himself, or from the report of a person or persons appointed by him, or from the statements of the company, or from any knowledge or information in his possession, (1) that the capital stock or guarantee fund of any company heretofore or hereafter incorporated or organized under the laws of this state doing in this state any kind of an insurance business is impaired, or (2) that such company is insolvent, or (3) that such company has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent or his deputy or his examiner, or (4) that such company has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction, the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society, order, partnership or individual without first having obtained the written approval of the superintendent of insurance as provided by law, or (5) that such company is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders or to its creditors or to the public, or (6) that such company has willfully violated its char-

ter provisions or any other law of the state, or (7) that such company has an officer who has refused to be examined under oath touching its affairs, or (8) that such company is organized under Articles 2, 3, 4, 5, 6, 7, 8, or 11 of this chapter and is found to be in such condition after examination that it could not meet the requirements for incorporation and authorization specified in the law under which it was incorporated or is doing business, or (9), that such company has ceased to transact the business of insurance for a period of one year, said superintendent may institute a suit or proceedings in the circuit court in the county or city in which such company was organized or in which it has or last had its principal or chief office or place of business or in the county of Cole, to enjoin said company from further prosecution of its business, either temporarily or perpetually, or for a judgment dissolving such corporation or for both; and after the entry of such decree or judgment, the court upon the motion of the superintendent of the insurance department may order the liquidation, settlement and winding up of the affairs of such company or the rehabilitation of such company as provided in this chapter, together with such other decrees and orders in connection therewith as the court shall deem advisable. (R. S. 1929, Sec. 5941. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)"

"Sec. 6053. Manner of Commencing Suit.--Such suit shall be commenced by filing a petition in the name of the superintendent of the insurance department of this state, as plaintiff, against the company, proceeded against as defendant, and said petition shall contain a brief statement of the condition of the company proceeded against, or of the causes upon which the proceeding is based; it may also contain a prayer for temporary or permanent injunction, or for both, and shall conclude with a prayer for general relief, under which prayer the court may grant any relief or issue any injunction or writ, and make any decrees

or orders, under and within the provisions of this chapter, as shall be found advisable or necessary. (R. S. 1929, Sec. 5942.)"

"Sec. 6054. Of the Issuing, Service and Return of Process. Upon the filing of such petition, the clerk of the court shall forthwith, and of course, issue a summons, requiring the defendant to appear before the court, if it be in session, or before any judge thereof, if the court has either adjourned for the term or to a day beyond three days from the date of issue of said summons, and to answer the petition on the return day of said summons. Said summons shall be returnable in three days after its issue, and shall be served as provided by law for service of process upon corporations in civil cases. If an injunction is prayed for, the petition shall be presented to the circuit court, or judge thereof, and the court or judge to whom it is presented shall thereupon make an order for the issuing of an injunction, providing its term and fixing the return day of the summons, which shall not exceed three days from its date; and upon such order being made, the petition shall thereupon be filed in the clerk's office, and the writ of injunction shall issue, together with the summons as above provided. Any writ of injunction issued under this law may be served and enforced as provided by law in injunctions issued in other cases, but the superintendent of the insurance department shall not be required to give any bond as preliminary to or in the course of any proceedings to which he is a party as such superintendent, under this chapter, either for costs or for any injunction, or in case of appeal to either the supreme court or to any appellate tribunal. If the first summons issued be not served, then other summons may issue, returnable as the court or judge may direct; or the court or judge to whom said petition has been presented, or who has jurisdiction of the case, when satisfied by the affidavit of the superintendent, or of any other person, either when the pe-

tition is first presented or afterward, or on return of any summons unserved, that for any cause personal service cannot be made on said company within the three days, may order the company proceeded against to be notified of the institution of the suit, its nature, and of the return day of the summons, which in such case shall not be less than fifteen nor more than twenty-three days from the date thereof; and thereupon the clerk shall cause notice to be published in some newspaper published in the city or county in which the suit is pending--if there be a daily paper, then in such paper for ten days consecutively; or if there be no daily paper, then a weekly paper three times successively--in either case the last publication to be at least three days before the summons is returnable. Proof of such publication shall be made as provided by law for like notices in civil cases. (R. S. 1929, Sec. 5943.)"

"Sec. 6055. Proceedings on Return of Process.--Upon the return of such process duly served, or proof of such publication made, the petition shall be heard summarily before said court or a judge thereof, who may, at such hearing, or at any time thereafter, for cause shown, dissolve, modify or continue the injunction: *Provided, however*, that before the defendant shall be permitted to make any such motion, or to be heard on any motion it shall first have answered the petition. If, on the return day of the summons, the defendant shall enter its appearance to the action, and apply for further time in which to answer, the court or judge may extend the time for answering to not exceeding three days from said return day. If the defendant fails to answer on the return day, or within the time granted it as above, or fails to appear, the court or judge shall, on motion of the plaintiff, proceed to hear, determine and adjudge the cause, as herein provided, and thereafter proceed in such cause as herein provided. The pleadings and proceedings, in so far as not otherwise regulated by this

chapter, shall be as in other civil causes. All pleadings shall be filed within the time herein provided, or as designated by the court or judge, and without regard to terms of the court as to the time of filing the same; nor shall the adjournment of the court for a term work a postponement of proceedings hereunder to the next term, but the same may be had in vacation as well as term time, and any orders made in vacation or by the judge shall be entered up as of a special term. (R. S. 1929, Sec. 5944.)"

. "Sec. 6056. Hearing by the Court.--The court or judge, on the return day of the summons, shall set the case for hearing on some day not exceeding five days from the return day. All pleadings shall be made up and filed at or before said day for hearing, and the judge or court shall, without the intervention of a jury, and without unnecessary delay, proceed to hear and determine said cause; or on motion of the plaintiff, but in no other case, the judge or court may, on the return day, refer the hearing of the case to a referee, with power to hear the testimony and report his conclusions on the same to the court or judge. If the case is referred, the referee shall forthwith proceed to hear the same, and shall file his report within ten days after the conclusion of the testimony. Any referee failing to at once proceed with the hearing, or to file his report within the time aforesaid, may be removed by the court or judge, in which case he shall not receive any pay or allowance whatever for his services; and the court or judge may thereupon hear the case or appoint a new referee. The fees of the referee shall be taxed and paid as costs in the case. The referee may be allowed for his services not exceeding one dollar and fifty cents for each hour actually spent by him in hearing the testimony in the case, and for taking down the testimony and writing out the same in his report, not exceeding fifteen cents per each hundred words in his report, no pay or allowances whatever being made for ex-

hibits or their contents, or for figures or numerals; and in addition to the above, he may be allowed a fee of not exceeding one hundred dollars for his services in making his report; besides these, no other fees or allowance shall be taxed in favor of the referee or anyone employed by him, and he shall pay his own clerk or reporter, if he employ one. Exceptions to the report of the referee may be filed by either party. If no exceptions are filed within three days after the report is presented to the court or judge, it shall be confirmed, and judgment entered thereon. In a hearing before the court or judge, or referee, certified copies of the statement made by the company proceeded against, or of reports of examinations of the company made by the superintendent, or persons appointed by him, shall be received, if offered by the superintendent, as *prima facie* evidence of the facts therein contained pertaining to the condition and affairs of the defendant. If the finding be for the defendant, it shall be lawful for the superintendent to appeal the case. If the finding be for the plaintiff, the court shall enjoin the company, either temporarily or perpetually, from the further prosecution of its business, or the court shall render judgment dissolving the company, or the court may render both such decree and judgment. Such decree or judgment shall, for all purposes of an appeal, be considered a final judgment, and the defendant may appeal from the same as in other civil cases: *Provided*, the appeal be prayed for and perfected within five days after such judgment, and that the bond shall be for such an amount as the court may fix; and *provided*, that no appeal nor *supersedeas* bond shall operate as a dissolution of an injunction or judgment, if one has been issued. (R. S. 1929, Sec. 5945. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

"Sec. 6057. Insurance Superintendent to Take Charge--When.--If the superintendent of the insurance department shall apply, either at the time of or

after the filing of the petition referred to in section 6052, R. S. of Mo. 1939, the court may, if the court deem it necessary, authorize him to temporarily take charge of the property of the defendant and to receive its premiums and other income until a final decree is rendered. (R. S. 1929, Sec. 5946. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)"

"Sec. 6055. Title of Assets to Vest in Superintendent.--Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company and such other persons as may be interested in such assets. (R. S. 1929, Sec. 5947.)"

"Sec. 6060. Allowance of Demands -- Commissioners Appointed.--The court or judge in or before whom the case is pending upon the application of said superintendent, shall limit and may extend the time for the presentation of claims against such company, and notice thereof shall be given in such manner as said court or judge shall direct; and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of such company. Said court shall appoint one or not more than three disinterested persons as commissioners to receive and decide upon the claims presented against such company, who shall give notice of the times and places of their meeting for that purpose, in such manner as said court shall prescribe, and within one month after the expiration of the time so limited, shall file with the clerk of said court a list of the claims presented to them, specifying those allowed, the amount allowed and those disallowed. (R. S. 1929, Sec. 5949.)"

"Sec. 6061. Duties and Powers of Superintendent.--If the Court directs or orders the superintendent of the insurance department to rehabilitate an insurance company, upon the rendition of such an order, the title and right to possession of its books, papers, records, property and assets, of whatsoever kind or nature, shall immediately vest in and pass to the superintendent of the insurance department, and said superintendent shall forthwith proceed to conduct the business of such insurance company and take all proper steps to remove the causes and conditions which have made such proceedings necessary, subject, however, to the order of the court. Said superintendent may, subject to the approval and direction of the court, sell and dispose of any of the property of such company, may borrow money on the security of such property, may execute in his own name as superintendent of the insurance department all necessary and proper instruments and conveyances, and may also in his own name as such superintendent, maintain and defend all actions in the courts of this or any other state or states of the United States relating to such company, its assets, business and liabilities. If at any time, in the opinion of the superintendent of the insurance department, a further continuance of the order of rehabilitation would be futile, he may apply to the court for an order to liquidate, settle or wind up the affairs of such company, or if at any time during the continuance of such order of rehabilitation the cause for any such order or like order has actually been removed, the superintendent of the insurance department or any interested person, upon due notice to such superintendent, may apply for an order terminating the proceedings and permitting such insurance company to resume title and possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court shall determine that the purpose or purposes of the proceed-

ings have been fully accomplished. (R. S. 1929, Sec. 5950. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)"

"Sec. 6063. Superintendent to Take Charge of Assets.--Whenever, by this chapter, or by any other law of this state, the superintendent of the insurance department is authorized or required to take possession of the assets of any insurance company, any person or company who shall neglect or refuse to deliver to said superintendent, on his order or demand, any books, papers, evidences of title, or debt, or any property belonging to any such company in its, his or their possession, or under his, its or their control, shall be punished by a fine of not more than ten thousand dollars, or, if an individual, by imprisonment in the county jail for not exceeding two years, or in the penitentiary for not exceeding three years, or by both said fine and imprisonment. (R. S. 1929, Sec. 5952.)"

"Sec. 6064. Reinsurance of Dissolved Companies. --Whenever any decree enjoining a company perpetually from further prosecution of its business or judgment of dissolution is rendered or granted under the provisions of this article, the superintendent of the insurance department may make or cause to be made, a report verified by affidavit, showing the actual condition of such company. Whenever such report shall show facts warranting, in the opinion of the superintendent of the insurance department, the reinsurance of the risks of such company, then, subject to the approval and direction of the court, said superintendent shall proceed to reinsure such risks on the best terms obtainable for all persons interested. (R. S. 1929, Sec. 5953. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)"

"Sec. 6065. Payment of Expenses of Proceedings. --In proceedings to enjoin, rehabilitate, dissolve, wind up or otherwise settle the affairs and dispose of the assets of insurance companies, the superintendent of the insurance department shall receive no fees nor compensation for any services personally per-

formed by him. He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to the amount of compensation to be paid them, and the expenses of such employment, together with all necessary expenses in the settlement of the business of the company, or the collection, disposition or distribution of its assets shall be taxed as costs, and paid by the superintendent out of the assets of such company; or, in case it is reinsured, by the reinsuring company, or if the company proceeded against has no assets, then as by law in such cases provided, to the persons doing the work and rendering the service. The superintendent shall keep a full account of all receipts and disbursements, and make report of the same to the court having jurisdiction thereof at least once in twelve months, and oftener if required by the court, and shall be responsible on his official bond for all assets coming into his possession. The court may, in its discretion, require of the superintendent a bond in addition to his official bond (R. S. 1929, Sec. 5954. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)"

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No. 755.

OCTOBER TERM, 1943.

C. E. MOTTAZ, I. C. SMITH, VIRGINIA BEHNKEN, WILLIAM H. MORGENS, AND CONTINENTAL COMPANY, A CORPORATION,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, GUSTAVE J. CRECELIUS, ANNA M. CRECELIUS AND MYRTLE K. CRECELIUS AND KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION,
RESPONDENTS.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Respondents have misconceived this case.

Petitioners' contentions are:

(1) The Missouri insurance code as interpreted by the Supreme Court of Missouri is an exclusive code under which the rights of all persons interested in an insolvent insurance company must be determined (p. 14, Brief).

(2) The Supreme Court of Missouri did not determine the rights of petitioners under the code but resorted

to equity. The opinion is not based on construction of that code but is in disregard of it (R. 313).

(3) Determination of the rights of petitioners, not based on construction of the exclusive code, is a denial of the equal protection of the laws guaranteed in the Constitution of the United States (p. 14, Brief).

(4) Under the code petitioners are entitled to the fund because it can only be awarded to *interested persons*, and petitioners constitute the only, remaining, eligible, *interested persons* (pp. 17-20, Brief).

(5) The Supreme Court of the United States, under a claim of denial of equal protection of the laws, will receive and determine a case founded on local law when the State court has determined rights in disregard of that existing local law (pp. 20-22, Brief).

(6) Assertion by petitioners, in the Supreme Court of Missouri in the motion for rehearing in Division No. 2 and thereafter preserved, of the denial of the equal protection of the laws guaranteed by the 14th Amendment to the Constitution was timely, and within the scope of the exception recognizing that ground as timely when then raised, because the disregard by the Supreme Court of Missouri of the existing law that the insurance code is exclusive and its decision of the case on equitable principles *could not reasonably have been anticipated* (p. 22, Brief).

Respectfully submitted,

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